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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1447

BURL RAINES,
Petitioner,

v.

AMERICAN MAIL LINE, LTD.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petitioner, Burl Raines, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals entered in this proceeding on the 3rd day of March, 1975, which order denied petitioner's petition for rehearing.

OPINION BELOW

This case was tried in the U. S. District Court for the Western District of Washington, Seattle, Washington, before the Honorable William T. Beeks, one of the Judges

of that court, between the dates of February 5, 1973 and February 15, 1973. Judge Beeks rendered his decision in favor of respondent and dismissed petitioner's cause of action against respondent on the 9th day of March, 1973. Judgment dismissing this action was entered on March 13, 1973. Plaintiff took a timely appeal to the United States Court of Appeals for the 9th Circuit, which court heard argument on January 8, 1975, and entered judgment affirming the decision of the trial court on January 15, 1975. Thereafter petitioner petitioned for reconsideration, which petition was denied and judgment entered for respondent and against petitioner on March 3, 1975. Neither the opinion of the trial court or of the Court of Appeals for the 9th circuit was officially reported. Copies of the opinions, judgments, and orders, referred to herein are appended hereto, pursuant to Rule 23(i) of the Rules of the Supreme Court of the United States.

JURISDICTION

1. The judgment affirming the decision of the trial court concerning this matter was entered on January 15, 1975.

2. The order which denied petitioner's petition for rehearing was filed on March 3, 1975.

3. The statutory provision conferring jurisdiction on this court appears at 28 U.S.C.A. §1254(i).

QUESTIONS PRESENTED

1. Where the undisputed evidence establishes that a series of related acts or omissions culminated in a condition of unseaworthiness, *i.e.*, an unsafe method of loading, which unsafe method of loading proximately resulted in injuries to petitioner, must not the decision of the court be

in favor of petitioner concerning the issue of liability?

2. Is the decision of the court inconsistent with, or irreconcilable with the decisions of the court in the cases of *Burns v. Anchor Wate Company and Brown and Root, Inc.*, 469 F.2d 730 (5th Cir. 1972), 1973 A.M.C. 215; and *Tucker v. Calmar S.S. Corp.*, 457 F.2d 440 (4th Cir. 1972), 1972 A.M.C. 1159?

3. Has the United States Court of Appeals for the Ninth Circuit misinterpreted, or improperly utilized, the opinion of the court in the case of *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 500, 91 S. Ct. 514, 518 (1971), as a basis for the decision of the court in affirming the judgment of the trial court and as a basis for its decision to deny petitioner's petition for rehearing?

STATUTES INVOLVED

Counsel respectfully submits that this case does not involve examination of any constitutional provisions, treaties, statutes, ordinances or regulations.

STATEMENT OF THE CASE

Petitioner, Burl Raines, was an experienced longshoreman and had worked in that capacity on the Seattle waterfront from approximately 1965 to January 5, 1970, the date of his injury. He was employed by respondent American Mail Lines, which employed its own stevedores rather than contracting with an independent stevedoring company. During that period of time he had performed practically all types of work available for a longshoreman on the Seattle waterfront. (Tr. 26, 27) On the night of the accident he was assigned from the hiring hall to report to Pier 46 to work as a slingman concerning the loading of cargo

aboard the WASHINGTON MAIL. Shortly after his arrival at the Pier at approximately 8:00 p.m., he was joined by one Virgil Lund, who became his partner in working as a slingman. (St. 195, 196, 115, 117) Mr. Lund was also an experienced longshoreman and slingman. (Tr. 113, 114) Defendant's vessel WASHINGTON MAIL was lying portside to the dock with the bow pointing in an easterly direction and cargo was being loaded into the vessel from gondola cars which were spotted on spur tracks parallel to the port side of the vessel. (Tr. 32, Ex. 10) The gondola cars from which the cargo was being discharged into the WASHINGTON MAIL were approximately fifty feet long and eight feet wide. (Tr. 36) The WASHINGTON MAIL was a six hatch ship, the hatches being numbered consecutively commencing with the most forward hatch. (Tr. 34) At the commencement of petitioner shift some general cargo was being loaded at some of the hatches and at least two hatches were loading steel. (Tr. 34, 87, 119, 120, 45, 46, 47) Counsel for the parties stipulated that each separate bundle of steel weighed 5400 pounds. (Tr. 78, 79) The bundles were being handled two at a time. (Tr. 78, 123, 124, 48, 49)

At the actual time of the accident in question steel was being loaded at hatches 2, 3 and 5. (Tr. 47 (Stipulation of parties)) The attention of the court is invited to respondent's exhibits A-16, A-47, and A-47-A for illustrations of the relative positions and location of the vessel, the dock, the gondola car, and the rigging.

Raines and Lund began to work in the gondola car adjacent to the No. 4 hatch at the commencement of their shift, shortly after 8:00 p.m. (Tr. 117, 196) They continued to work at No. 4 hatch until shortly before their coffee

break, at which time they were transferred to discharge cargo from a car located adjacent to No. 5 hatch. (Tr. 196, 197, 120) Raines and Lund and the other members of the gang assigned to hatch No. 5 returned to work from the coffee break at approximately 10:15 p.m. (Tr. 197, 120) Immediately following the coffee break the gang at the No. 5 hatch consisted of: Raines and Lund, located in the gondola car adjacent to the No. 5 hatch, Richard Cross, as winchdriver and Albert Wylie, as hatchtender. (Tr. 120, 121)

At the commencement of the shift, *i.e.*, approximately 8:00 p.m. on the evening in question, the tide was very low and still falling. The tide continued to fall until 8:54 p.m., at which time it was a minus 2.4. (Tr. 119) At the time of the actual occurrence of the accident, the rail of the vessel WASHINGTON MAIL was approximately even with the bullrail of the dock. (Tr. 32, 33, 34, 87, 118, 119, 161, 327) Wylie and Cross had been trading, *i.e.*, alternating duties as hatchtender and winchdriver, prior to the occurrence of the accident. Immediately following the coffee break which was immeidately prior to the accident, Cross re-assumed the duties of winchdriver and Wylie reassumed the duties of hatchtender at the No. 5 hatch. (Tr. 160, 161, 328, 329)

Due to the low tide conditions and the resultant relative position of the rail of the vessel to the bull rail of the dock to which the WASHINGTON MAIL was moored, it was impossible for the hatchtender or the winchdriver to see into the gondola car in which Raines and Lund were employed immediately prior to the occurrence of the accident. (Tr. 57, 58, 92, 93, 161, 163, 164, 166, 167, 330, 335) When the gang assigned to No. 5 hatch returned from the

coffee break, the east end of the gondola car in which petitioner Raines and Lund were working was emptv of steel bundles and the west end of the car contained approximately two layers of steel bundles, each bundle being approximately one foot high and eighteen inches wide and 20-24 feet long. (Tr. 122, 123, 141, 142) The size, appearance, and method of stacking or stowing the steel bundles in the gondola car in question is probably best illustrated by examination of Exhibits 13, 13a and 13b, all of which are photographs taken shortly after the occurrence of the accident and before any further steel bundles were removed from the gondola car. (Tr. 38, 38A, 39, 125)

Immediately following the coffee break, the cargo slings were placed on the east and west end of a two-bundle load of steel by petitioner Raines and Lund. The two bundles which made up this particular load were located on the inshore, *i.e.*, on the north side of the gondola car. (The position in which these two bundles were stowed immediately prior to being lifted from that position is best illustrated by examination of Exhibits 13, 13a, and 13b.) (Tr. 197, 198, 123, 124) Petitioner and his working partner were able to affix the sling to the east end of the two-bundle load in a manner satisfactory to them, but they were unable to properly affix the sling to the west end of the load. (Tr. 198, 123 and 124) Raines and Lund left the west end of the gondola car and walked to the empty east end of the gondola car after they had placed the slings to the best of their ability on each end of the load. (Tr. 124, 125, 198) Petitioner Raines and Lund remained in the east end of the car while the winchdriver, Cross, raised the load and, "re-landed" it. (Tr. 124, 125, 126, 198, 331, 332, 334, 335, 336) After Cross had "re-landed" the load, it was positioned at

approximately a 45 degree angle within the gondola car, resting on the bundles of steel which were yet stowed in the west end of that car. To further explain the position of the "re-landed" load, the west end of the load, after it had been "re-landed" was nearest the south side of the gondola car and the east end of the load was nearest the north side of the gondola car. (The attention of the Court is further invited to defendant's Exhibit A-3, which more clearly illustrates the position of the "re-landed" load prior to the occurrence of the accident.) (Tr. 198, 199, 125, 126)

Raines and Lund observed and examined the position of the "re-landed" load before going forward to re-sling the west end of the load. On the basis of their observation and examination of the position of the load they were both satisfied that it was firmly and solidly resting on the existing stow of steel bundles in the west end of the car before either Raines or Lund proceeded forward to re-sling the west end of the load. (St. 126, 199, 203) Raines and Lund then proceeded toward the west end of the car from the east end and more or less along a route nearer to the south side of the car for the purpose of reslinging the west end of the load. Raines was in the lead, *i.e.*, ahead of Lund, as the two slingmen proceeded to the west end of the car. (Tr. 127) When the two slingmen reached a point approximately half way between the west and east end of the "re-landed" load, Lund saw the load start to move and yelled, "Lets get out of here," or words to that effect. (Tr. 127, 128, 200, 201) Lund and Raines both began to run to the east end of the car, Lund cleared the east end of the load, but that end of the load swinging in an arc, caught Raines' legs against the south side of the car. (Tr. 128, 129, 130, 200, 201, 202, 204) The red "X" appearing on exhibit

13-B shows where the end of the load crushed plaintiff against the south side of the gondola car.

Counsel for petitioner respectfully submit that there is probably little disagreement among the witnesses who testified for either or both parties in this case concerning whether or not an extra hatchtender or signalman was needed, for purposes of safety, in view of the physical circumstances existing at the time petitioner commenced his sihft and up until the time of his injury.

Further, it should be stated at this point that there is absolutely no dispute between the parties as to whether or not an extra hatchtender, lookout, or signalman had, in fact, been positioned at a location where he could see into the gondola car to watch what was occurring with reference to the load being lifted therefrom and receive and relay necessary signals from the hatchtender and/or the slingman respectively. No such person was so positioned. (Tr. 54 and 55)

Mr. Shaun Maloney testified to the effect that, in his opinion, the method of loading employed during petitioner's entire shift was unsafe. As will be illustrated below, he also described the corrective measures that could be taken and which would have prevented the occurence of the accident.

"Q. Now, Mr. Maloney, taking into consideration the observations you made to the effect that this was a cranky ship prior to the time this accident happened, taking into consideration all the observations that you made at the scene of the accident shortly after it happened and thereafter, all concerning which you have just testified, and based on your training and experience in your years of going to sea and working on the waterfront, specifically tak-

ing into consideration what rules of safety you have learned and worked with and are continuing to work with, I will ask, you, sir, do you have an opinion as to whether or not under all the circumstances existing there that night and immediately prior to the accident whether or not it was a safe method being practiced there of loading this vessel at the number five hatch when no lookout or signalman was stationed on the dock or on or near the gondola car?

"A. I do not consider it to be a safe operation.

"Q. Why not, Mr. Maloney?

"A. When the winch driver or the hatch tender are not able to properly observe the entire operation. The safer way is where the winch driver can observe the entire operation. Short of that, the hatch tender is the next most safest way. But in this instance I contend that neither man could have seen that operation.

"Q. And why couldn't they?

"A. Well, because of the way the vessel was laying and the inside height of the gondola.

"Q. Now, Mr. Maloney, what would have been a corrective measure or a safer practice to follow, taking into consideration all the facts as they existed immediately before that accident? In other words, what I am asking you, sir, is what could have been done to prevent this accident?

"A. I think what the company could have done to make this the most safe operation possible was have an additional hatch tender positioned so that he could observe the inside of the gondola to signal the winch operator.

"Q. And under the circumstances existing there that night, where would he have been, approximately?

"A. He would have had to be staioned aboard the gondola in some position, or like sometimes we have a fork lift with a bunch of board in a little platform.

"Q. You have him stand on that?

"A. Yes, sir.

"Q. Would the fork lift be located on the dock then?

"A. The fork lift would be on the dock, or a stack of boards where he could observe the operation.

"Q. Now, what would this lookout or signalman do now typically under these circumstances that we are dealing with in this case, if they had had him there, what would he have done?

"A. Oh, he could have signaled the winch operator on the landing of the load, he could have signaled the winch driver when he noticed the ship heeling over to come back, and he could have signaled the winch driver when the men were in the clear and safe. That's the normal duty of a safety hatch tender.

"Q. Now, in your years of working on the waterfront and including the time you were sailing, have you seen approximately similar factual situations or physical situations as existed there that night immediately prior to this accident where such an additional safety man or signalman was positioned in the manner you suggested?

"A. Yes. Many, many times we have additional men because of the peculiar way in which cargo is being loaded and stowed. It sometimes calls for one and sometimes two additional men. It depends sometimes on the complication of decks and vision and the type of cargo." (Tr. 58, 59, 60, 61)

Mr. Lee Anderson testified in a similar manner indicating that the method of loading employed prior to and at the time of the accident was unsafe and describing the corrective safety measures that would have prevented the accident:

"Q. All right. Now, Mr. Anderson, I'm asking you this question based on your twenty years' experience in working on the waterfront in the capacities you

have described here to the Court. Under circumstances such as existed on the night of this accident, on January 5th, of 1970 where the winch driver cannot see—let's assume he can see at least from the shoulders up of the slingmen in a gondola car of the type they had there that night, that they were working out of that night. What has been your experience as to whether or not an extra signalman or hatch tender is stationed to give signals to the winch driver concerning what is happening to the load or what is going on in that gondola car, have you had experience along that line?

"A. Your question is have we had signalmen in those cars previous to this, is that your question?

"Q. Well, yes, I asked what has been your experience under circumstances where you are loading steel out of a gondola car similar to the situation that existed there that night, what has been your experience with reference to whether or not they will station a signalman or lookout on the dock or on or near the car to give signals from those in the car to the winch driver?

"A. Well, in order to make the operation a safe operation, they should have a signalman in the car or stationed close to the car, like on a platform so he can see the whole operation and relay it to either the hatch tender or the winch driver, the hatch tender on the ship or the winch driver.

"Q. All right. Now, have you seen that done in your years of working on the waterfront under circumstances where the winch driver cannot see into the gondola car, have you seen them position such a man to serve that purpose?

"A. I can't recall offhand. I know we've had extra signalmen in predicaments where we can't see, but I couldn't pinpoint that I've ever been on a job in a gondola car, but I've been on various jobs where we have had additional signalmen or hatch tenders because of the vision of the winch driver.

"Q. Now, if the winch driver can see the load himself, you don't need an extra signalman, do you?

"A. That's right.

"Q. Mr. Anderson, taking into consideration the level of the tide that night, just before the accident happened, the level of the rail of the ship as compared with the bull rail on the dock, taking into consideration the vision that the winch driver did or did not have of the gondola car and those in it that night just before the accident, taking into consideration the action of this vessel as you have testified when the loads were lifted from the dock and over towards the center of the vessel, and based on your twenty years' experience in longshoring, could you advise the Court whether you have an opinion as to whether or not under these circumstances this was a safe operation, the manner in which they were handling the cargo and discharging out of that gondola car at number five hatch without an additional signalman or lookout either on the car or on the dock to give signals to the winch driver do you have an opinion as to whether that was a safe operation?

"A. Yes, I have an opinion, and I definitely say that it wasn't a safe operation." (Tr. 93, 94 and 95)

Albert Wylie testified that he had requested an extra man to act as signalman concerning the loading operation at the No. 5 hatch during the second hour of his shift prior to the accident. (Tr. 162, 163) He also testified, in substance, that he did not feel that the method of loading employed prior to petitioner injury was safe and he also described the methods which could have been utilized to make the loading operation safe and/or to prevent the occurrence of the accident in question:

"Q. (By Mr. Goodwin) At any rate let me ask you this, Mr. Wylie: Did you feel at the time you made this request for the extra man, did you feel that without

the extra man to act as a signalman there, that this was a safe operation?

"A. No, it wasn't a safe operation.

"Q. And why did you feel it wasn't a safe operation?

"A. Because when the two slingmen had both their hands full trying to hook up a load or something there's no possible way they are going to stand up and give a signal.

"Q. All right.

"A. They might holler to the winch driver, but that's not really safe either.

"Q. Why isn't it?

"A. Because somebody else might holler in another hatch and the winch driver might think it's him. You don't know.

"Q. All right.

"A. Unless he's standing up looking right at him.

"Q. Now, what did you contemplate that this extra man that you requested of Mr. Winstad, the hatch foreman, what did you contemplate he was going to do at hatch number five concerning that loading operation if they had seen fit to furnish him?

"A. They have special platforms that they put up with a fork lift where this man sits in this type of a cage and he gives signals, and it has been past practice that they have used it.

"Q. All right. Now, when he is in this cage on this fork lift can he see the winch driver and the hatch tender on the vessel?

"A. He can see the winch driver and the whole operation in the car.

"Q. All right, I was going to get to that, but he can see the hatch tender and the winch driver on the vessel and also the slingmen in the car?

"A. Right.

"Q. All right. And what is his purpose when he is in that position?

"A. His purpose is an extra hatch tender for safety.

"Q. All right. Did you get the man?

"A. No, we never." (Tr. 164, 165 and 166)

"MR. GOODWIN: All right, sir.

"Q. (By Mr. Goodwin) Now, Mr. Wylie, once again I want you to take all those factors into consideration that I just asked you to consider in that last question and assume all those facts to be true that I asked you to assume as being true in that last question.

"Now, based on your experience on the waterfront if that man, that extra hatch tender, had been provided or if he had been there all the time as you requested in the position or any position where he could see the winch driver and he could see the men in the car, and so forth, see the whole operation, do you think this accident could have been prevented?

"A. Yes, I sure do.

"Q. Is that the reason you asked for him when you did?

"A. Right. Steel is a dangerous job anyway.

"Q. Why is steel a dangerous job?

"A. There are just so many things that can happen. A sling can be cut or anything can happen. One end might come unhooked, or they could topple over, there might be a band hook up on another load or something. You've got to be on your toes all the time.

"Q. Okay. What would you have expected that signalman, or that extra hatch tender as you put it, to have done to have prevented this accident, assuming he had been there?

"A. He would be looking at the operation, what the men are doing in the car, and the winch driver would have his eyes on him all the time.

"Q. On him, you mean on the extra hatch tender?

"A. On the extra hatch tender, and as soon as the slack started to come out of them slings or anything started to move, right now he'd wave him to come back.

"Q. Who would wave him to come back?

"A. The extra hatch tender would.

"Q. Who would he give that signal to?

"A. Directly to the winch driver.

"Q. And what would 'come back' mean to the winch driver if he got that type of signal under those circumstances?

"A. More slack.

"Q. How would that have prevented this accident?

"A. That load would never have been picked up.

"Q. All right.

"THE COURT: What do you mean by 'it wouldn't have been picked up?' Was it picked up?

"A. It had to be picked up to swing to the ship's side of the car.

"THE COURT: I thought you said the ship could have moved it by the ship righting itself.

"A. Well, if the ship rolls it's going to raise the boom, which is going to take the slack out of the slings to lift the load.

"THE COURT: Yes, I know, but—

"A. Not necessarily the winches being turned on.

"Q. (By Mr. Goodwin) Let me ask you this, Mr. Wylie: You used the term, I think you said in effect, you correct me if I'm mistaken, if the slack had come out, if they had given it more slack the load would never have been picked up. Now, when you said "picked up" did you mean picked up by operation of the winches or did you mean moved?

"A. I mean just plain moved.

"Q. All right. Well, just for the record now, assuming, I'm just going to ask you to kind of explain this on the basis of your experience on the waterfront now. Assuming that the extra hatch tender had been in a position as you suggested where he could see the whole operation, and assuming that he was sitting there and he could see the winch driver and he could see the men in the car and that the two men, Raines and Lund, were starting to walk toward the west end of that car to re-sling the west end of that load and at that moment the ship rolled outboard away from the dock in such a manner as to cause the slack to come out of the sling attached to that load. Now, what would this hatch tender, this extra man, be expected to do now to keep that load from moving in the car?

"A. Right.

"Q. What would he do?

"A. He would holler and—well, what I would do is start screaming and hollering and tell him to come back, giving him hand signals and hollering too.

"Q. All right. And if the winch driver received such a signal to come back under those circumstances, he would then give more slack, is that correct?

"A. Automatically.

"Q. And the load then, of course, would not move within the car, is that right?

"A. (Witness nods his head.)

"Q. You've got to answer out loud.

"A. Yes.

"Q. Okay." (Tr. 171, 172, 173, 174 and 175)

Captain Adrian F. Raynaud was called as a witness on behalf of petitioner. Apparently the qualifications and experience of this witness were recognized by opposing counsel and by the trial judge. (Tr. 224) Counsel for petitioner

posed a lengthy hypothetical question, commencing at page 224 of the transcript and continuing to page 232 and part of 233. No objection to the accuracy of completeness of this hypothetical question was interposed by counsel for respondent. At the conclusion of the question, the witness testified as follows:

"Q. Do you have an opinion based on all those facts as to whether or not that was a safe method of loading that they were employing that night?

"A. No, it was not.

"Q. And why wasn't it, sir?

"A. Well, because the hatch tender is the only one that is assigned to give signals, and the winch driver doesn't move his winches until he gets the specific signal from the hatch tender. The slingmen are concerned with properly adjusting and securing that sling, and they have to watch their fingers because they are liable to lose their hands if they don't, so it behooves the operator then to assign another man to be located in the immediate vicinity so that he alone can direct the winch driver. He acts as a second hatch tender.

"Q. Now, Captain, if such a man had been assigned under the circumstances, the physical circumstances I have described in my hypothetical question I have posed to you, where in your opinion would have been a good place to so position him?

"A. Right at the very end of the car where the men were working.

"Q. Would that be the west end or the east end, sir?

"A. No, that would be on the west end because that's where the operation was, and he should be high enough so that he can look down into the bottom of the gondola so that he can see that the men are clear, that their hands, and fingers are clear and they can get out of the way." (Tr. 233, 234)

"Q. Now, what would such a man do if he saw the ship, if he noticed that as Raines and Lund were walking along the south side of that car toward the west end of the load, if he noticed the slack come out of that gear and the load—if he just noticed that because the ship was rolling out away from the dock, what would such a man do then at that point to prevent this accident?

"A. Well, he would immediately signal to the winch driver to come back on the fall so that the winch couldn't have moved.

"Q. All right." (Tr. 237)

"Q. (By Mr. Goodwin) Captain, when men are working down in a gondola car discharging steel as these men were on the night in question, what is the most dangerous time for these men or what is the most dangerous position they can be in?

"A. Well, when they are putting the sling around the load.

"Q. And why is that?

"A. Well, because their attention is concentrated on geting a couple of turns around that load so that it isn't going to slip when they pick it up and getting it hooked in properly, and they haven't got time to look at anything else but what they are immediately doing because they've got two hands in jeopardy.

"Q. Now, when the load if raised or about to be raised, let me put it that way, as I understand it, the common practice is, the safe practice is for the men to get over on the other end of the car when the load is going to be raised out of that car. Is that correct?

"A. That is correct.

"Q. And once it is raised above the level of the side of the car the danger to the men inside the car isn't so great any more, is it?

"A. No, as long as the load keeps on going towards the ship.

"Q. Right." (Tr. 238, 239)

Finally, and by way of concluding what counsel for petitioner respectfully submit are the undisputed facts involved in this case, it appears that this five-ton load of steel would only have moved and swung over to crush petitioner against the side of the gondola car for one or two reasons. Either the load was caused to raise by the rolling action of the vessel, which in turn caused the lines attached to the slings affixed to the load to become taut and to raise and swing the load, or the load was raised by operation of the winch at the No. 5 hatch.

Witness Maloney testified, at the conclusion of a hypothetical question to which defense counsel did not object, as follows:

"I will ask you, sir, based upon all the matters I have asked you to take into consideration and based upon your timing and experience in your business and profession that you told the Court about, and assuming that Mr. Cross did not touch those winch controls or do anything in operating the winch or the ship's gear to raise that load and cause it to swing, do you have an opinion, sir, as to what caused that load to raise up and swing over and pin Mr. Raines against the side of that gondola car?

"A. I do.

"Q. What is your opinion?

"A. My opinion is that when the trim of the ship changed, which was occasioned by being from one position to the other, that raised the yard boom in a position that that load, this particular load that trapped Mr. Raines, was airborne and dragged into the skin of the car.

"Q. Now, if a safety man—

"THE COURT: In other words, is your opinion

that some movement of the ship caused that to slacken?

"A. Yes, Your Honor." (Tr. 62, 63)

Witness Wylie, again at the conclusion of a lengthy hypothetical question to which counsel for respondent did not object, was asked the following question:

> "So based on all those considerations and assuming all those things to be true, and of course based on your eighteen years' experience down there on the waterfront, I'll ask you, do you have an opinion what made that load move when it did and pin Raines like it did?
>
> "A. The slack had come out of the sling somehow, either with the roll of the ship or the winches being turned on to lift that load to swing inboard towards the ship.
>
> "Q. If the winches were not used to do it what would have caused it to move?
>
> "A. If the ship was rolling. Say another gang forward took a load in, as soon as he got over dead center of the hatch she's going to list the other way, which is going to raise the boom and swing it into the ship's side of the car.
>
> "THE COURT: *You know, Mr. Goodwin, I don't need an expert witness on this. That is the only physical alternative as to how it could happen. I have to find which one.*" (Emphasis supplied)

Captain Adrian Raynaud stated the following opinion at the end of a lengthy hypothetical question to which counsel for respondent did not object.

> "Now assuming all those facts to be true and taking into consideration of course, Captain, your years of experience in your profession, I will ask you sir—the first question is this:
>
> "Under the circumstances described in the hypothetical question I have just posed to you what would

> cause the vessel to be cranky or to roll toward the dock while these loading operations were going on in the three hatches, what would cause that?
>
> "A. Well, the vessel evidently was very tender, and when you picked up two loads in number two and three, I think it's reasonable to assume that at the resumption of the work they came up almost simultaneously, you would have twenty tons hanging in midair, you would pull the ship down to the dock, and if they swung over to the center line of the vessel the vessel would naturally right and heel over the outboard side, and with one winch stabilized at number five it was bound to float the one end of this diagonally loaded load and cause it to swing over against the side of the car." (Tr. 232, 233)

As a result of the accident petitioner Burl Raines sustained severe crushing injuries to both legs below the knees. Counsel for petitioner have contended in a memorandum concerning damages which was inadvertently not included in the record on appeal, that the loss of earnings established by the evidence amounted to at least $26,000.-00, that the reasonable charge for medical services rendered for the injuries arising out of the accident was in the amount of at least $24,000.00, that petitioner's future loss of earnings, discounted to its present monetary value, would be in the sum of $92,891.00, and that a reasonable figure constituting a fair assessment of the compensation which should be awarded petitioner for the injuries arising out of this accident would be in the sum of $493,000.00. (Memorandum Concerning Issue of Damages will be filed prior to hearing.) As a further indication of the extreme severity of the injuries and damages experienced by plaintiff as a result of the accident involved in this case, the attention of the Court is invited to the content of the

"Memorandum Concerning Issue of Damages" filed by counsel for defendant (Record on Appeal, p. 61) wherein it is conceded that the medical expenses amount to at least $22,474.05, that the past wage loss would amount to at least $25,900.00, that the future wage loss would amount to at least $46,445.50, and that the past pain and suffering and future pain and suffering would have a value of $25,000.00 each, for a total of $50,000.00. Although counsel for respondent does not seem to concede that petitioner is permanently and totally disabled as a result of the accident in question, the testimony of doctors James Miller and Arthur Murray, the attending orthopedist and psychiatrist respectively, seem to leave little room for argument concerning that issue. (Tr. 313, 314, 315, 315-A, 513)

It should further be stated as part of "Statement of the Case" that the trial court stated and acknowledged, on at least three occasions during the trial of this cause, that the load of steel which crushed petitioner could not have moved by itself and that the load was caused to move for either of two reasons, i.e. the movement of the vessel due to the loading operations going on in adjacent hatches, or by operation of the winch.

"Q. Now, based on everything that you saw there that night and all the knowledge you have of the facts and circumstances surrounding this accident, and of course based on your experience on the waterfront in working at these various jobs, what made the load move in your opinion?

"A. The heeling of the ship. The ship was rocking, and as hindsight I found out why the load would lift without the gear. At that time I had no idea, but on questioning several more experienced men I find this to be the case, if it was hanging suspended—

"MR. SULLIVAN: If the Court please, I object to any further answer. He is saying what somebody else told him.

"THE COURT: Yes, I think your objection is well taken, *but it stands to reason that either it happened the way he said or that the winch driver moved it, and I've got to decide which. I mean there wasn't any other way for it to move.*

"MR. SULLIVAN: *No, that is correct.* (Emphasis supplied)

"THE COURT: It was an inboard list of the ship when she righted herself that moved it or the winch driver took up on the gear. *It has to be one of the two.*" (Emphasis supplied) (Tr. 137, 138)

(Direct questioning of witness Wylie):

"Q. So based on all those considerations and assuming all those things to be true, and of course based on your eighteen years' experience down there on the waterfront, I'll ask you, do you have an opinion what made the load move when it did and pin Raines like it did?

"A. The slack had to come out of the sling somehow, either with the roll of the ship or the winches being turned on to lift that load to swing inboard towards the ship.

"Q. If the winches were not used to do it what would have caused it to move?

"A. If the ship was rolling. Say another gang forward took a load in, as soon as he got over dead center of the hatch she's going to list the other way, which is going to raise the boom and swing it into the ship's side of the car.

"THE COURT: *You know, Mr. Goodwin, I don't need an expert witness on this. That is the only physical alternative as to how it could happen. I have to find which one.* (Emphasis supplied) (Tr. 171)

(Argument–Goodwin):

> "Mr. Goodwin: The fact is though Your Honor, the load moved. I think that is one thing that everybody agrees on, the load did move.
>
> "The Court: That load had to swing, and it had to swing with considerable force to injure Mr. Raines as he has been injured. That is a fact I will find." (Tr. 576)

This petition does not involve review of the judgment of a state court.

The basis for federal jurisdiction in the court of first instance was that the action was commenced under the provisions of the General Maritime Law, 28 U.S.C.A. § 1333 (i) and U.S. Const. Art. III, §2.

ARGUMENT

Counsel for petitioner Burl Raines will present his argument in the order in which the questions presented for review appear in this petition.

1. As illustrated in the Statement of the Case, there exists no factual dispute concerning whether or not petitioner Raines was struck by the load of steel, as to whether or not the load of steel swung in an arc from the position where it had previously been "re-landed" and was resting, to the point where it struck Raines, and as to whether or not the load could have "moved by itself." Neither counsel for respondent nor any of the witnesses called by either party disputed the fact that the load had in fact, "moved," swung in an arc, and crushed petitioner Raines against the side of the gondola car as he was running to get out of the path of the swinging load of steel. As illustrated further, under Statement of the Case, the trial court *on three*

occasions acknowledged that the load could only have been caused to "move" and swing to the point where it struck Raines for one of two reasons: the raising of the load by the winch operator or by the movement of the vessel in heeling inshore and offshore alternately, due to the loading operations being carried on in adjacent hatches.

As set forth in brief of appellant and in reply brief of appellant, the statement of the Honorable trial court in his memorandum opinion to the fact that an unidentified person or persons had testified "untruthfully" concerning an issue or issues, also unidentified by the court, and that, as a result, the court was unable to determine how the accident had happened, has no materiality or relevance whatsoever to the determination of the issues involved in this case and/or to the issues presented for review concerning this petition for writ of certiorari. Assuming for purposes of this argument that any witness, or witnesses, had testified "untruthfully," concerning any of the facts involved in this case, such alleged "untruthful" testimony could not have altered the fact that the load did, in fact, "move"; that it did swing in an arc, and did crush plaintiff against the side of the gondola car, and that it was impossible for the load to "move," other than as a result of the operation of the winches or the rolling action of the vessel.

Further, it is undisputed that neither the hatch tender or the winch operator could see what was occurring within the gondola car. It is also undisputed that respondent had not placed any person in any position where he could see what was occurring in the gondola car and where he could give appropriate signals to the wnch operator con-

cerning the movement of any load which was being handled by the men in the car so that the safety of those men could at all times be insured. If the load was caused to "move" by operation of the winches immediately prior to the occurrence of the accident, a signalman, positioned as suggested herein, would not have signaled the winch operator to move the load at a time when Raines and Lund were immediately adjacent thereto and thus that potential cause of the accident would have been eliminated. Alternatively, if the load of steel had been caused to to "move" by the rolling action of the vessel, the signalman would have been in a position to immediately signal the winch operator to allow slack in the lines which, in turn, would have caused the load of steel to be "relanded" in the gondola car, thus stopping the swinging of the load toward Raines, and the accident would not have occurred.

Clearly, the facts essential to the determination of the liability issue involved in this case were not in dispute. Counsel for petitioner did not ask the United States of Appeals for the Ninth Circuit, and counsel does not ask this court, to *weigh* disputed evidence, nor to "re-try" the case heard in the trial court but respectfully requests that this court recognize that the facts essential to, and requiring a finding in favor of petitioner concerning the issue of liability, *have never been in dispute!* Counsel for petitioner is unable to explain why the honorable trial court found it necessary to interject the allegation of "untruthfulness" into this case when even respondent's counsel raised no such issue during the entire trial, nor in his argument, and, more important, when even if such an allegation were

accurate, it would not alter the facts which require a finding in favor of petitioner.

2. Counsel for petitioner respectfully submits that the decision of the United States Court of Appeals for the Ninth Circuit is in direct and irreconcilable conflict with the decisions of the U.S. Court of Appeals for the 5th and the 4th circuits, respectively, and particularly with reference to the cases of *Burns v. Anchor Wate Company and Brown and Root, Inc., supra,* and *Tucker v. Calmar S.S. Corp., supra.*

Counsel for petitioner deems it unnecessary to discuss at length, or even briefly, the striking similarity between the factual situations involved in the cases of *Burns v. Anchor Wate Company and Brown and Root, Inc., supra* and *Tucker v. Calmar S.S. Corp., supra,* since even a cursory reading of those opinions will clearly demonstrate the similarity of the fact patterns between the cases cited and the case at bar. It is respectfully submitted, that without question had this case been tried in the United States Court of Appeals for the 4th or 5th Circuits, the result would have been a decision in favor of petitioner. The decision of the trial court and the affirmation by the U.S. Court of Appeals for the 9th Circuit, is in complete and irreconcilable conflict with the decisions of the courts of the 4th and 5th circuits concerning the cited cases!

3. United States Court of Appeals for the 9th circuit has stated, in part, in its opinion,

> "Negligence of the plaintiff or other workman, or both, may have been responsible, but an 'isolated, personal, negligent act' cannot create the condition of unseaworthiness." *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 500, 91 S. Ct. 514, 518 (1971).

That Honorable Court has completely misinterpreted and misapplied the *Usner* holding. As has been set forth in the presentation of petitioner's case at trial, in the briefs submitted in support of petitioner's postion during the trial and in Brief of Appellant and Appellants' Reply Brief, it was a series of acts or omissions on the part of defendant's employees which resulted in a loading operation being carried on under circumstances where neither the winch operator nor the hatch tender could observe what was going on in the gondola car. In other words the loading operation was being carried on with the winch operator and the hatch tender operating "blind."! It is impossible for counsel for petitioner to conceive how one familiar with the facts in this case could conclude that an "isolated, personal, negligent act" had caused the accident in question. Further, it is interesting to note that the Honorable Trial Judge did not base his decision on the *Usner* case nor even mention it in his opinion, or any time during the trial as being pertinent to the determination of the issue of liability involved herein!

There is appended hereto a copy of the opinion, findings and judgment of the trial court, marked Appendix A; a copy of the opinion of the United States Court of Appeals for the 9th Circuit marked Appendix B; a copy of the order issued by the United States Court of Appeals denying plaintiff's petition for rehearing marked Appendix C; and a copy of a document dated January 15, 1975 indicating that judgment was entered on January 15, 1975, affirming the judgment of that Court marked Appendix D.

This petition does not involve review of the judgment or decree of a state court.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue to review the opinion, judgment, and order of the United States Court of Appeals for the 9th Circuit.

Respectfully submitted,

DANIEL G. GOODWIN
Counsel for Petitioner

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BURL RAINES, *Plaintiff,* v. AMERICAN MAIL LINE, LTD., *Defendant.*	No. 16-71C2 OPINION

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Plaintiff, a Sieracki seaman, seeks to recover damages from his shipowner-employer resulting from extremely serious and crippling injuries to both legs. Said injuries occurred on January 5, 1970, while he was employed as a slingman in the loading of bundles of steel from a gondola car on the dock into the No. 5 hatch of the S/S WASHINGTON MAIL. Plaintiff contends that his injuries were proximately caused by the unseaworthiness of the vessel, as indeed he must to state a cause of action against his employer.[1] His theory is that his shipowner-employer failed

1. *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206, 215, 10 L. Ed. 2d 297, 304 and the liability of his shipowner-employer; *Reed v. Steamship Yaka*, 373 U.S. 410, 10 L. Ed. 2d 448; *Jackson v. Lykes Steamship Co.*, 386 U.S. 731, 18 L. Ed. 2d 488.

to provide a safe method of loading.[2]

The court has carefully reviewed the testimony of the principal actors in this tragic accident—the plaintiff, his slingman partner, the hatch tender, and the winch driver. None of them have been completely truthful in their testimony as to the manner of work or the manner in which plaintiff was injured. This lack of candor has made it impossible for the court to determine with any reasonable degree of certainty the exact cause of the accident. The prevarication was not necessarily perjury. It may have resulted from the subtle yet powerful influence of an interest in the result.

> ". . . [I]nterest in a result" makes "thought wishful, tends to weave into the continuity of a complete evidence of things not seen." Nederlandsche, etc., v. Standard Oil Co. (C.C.A.5). 66 F.(2d) 113, 114.

THE SILVER PALM, 94 F.2d 754, at 763 (9th Cir. 1938).

It is possible that plaintiff's injuries were caused by the negligence of the winch driver, or the plaintiff or his slingman partner, or a cominbation thereof. Negligence vicariously attributed to the employer, however, is not actionable.[3] The injuries were *not* caused by defective gear, inadequate lighting, movement of the vessel or failure to have a signalman stationed on the dock.

In other words, plaintiff has failed to establish, by a preponderance of that evidence which the court credits and believes, that the method of loading created an unreasonable risk of injury. Accordingly, he has failed to prove unseaworthiness.

The action is dismissed.

Dated this 9th day of March, 1973.

/s/ W. T. BEEKS
UNITED STATES DISTRICT JUDGE

2. *Blassingill v. Waterman Steamship Corporation*, 336 F.2d 367 (9th Cir., 1964); *Arvidson v. Dillingham Corporation*, 462 F.2d 1 (9th Cir., 1972).

3. *Arvidson v. Dillingham Corporation, supra.*

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE

BURL RAINES, *Plaintiff*, v. AMERICAN MAIL LINE, LTD., *Defendant*.	No. 16-71C2 FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER having come on for trial before the Honorable William T. Beeks, Chief Judge of the above entitled Court, on February 12, 13 and 14, 1973, the plaintiff appearing in person and by his attorneys, Roy E. Jackson and Daniel G. Goodwin of Jackson, Ulvestad & Goodwin, and defendant, American Mail Line Ltd., being represented by John P. Sullivan of Bogle, Gates, Dobrin, Wakefield & Long, its attorneys of record, and witnesses having been sworn and heard and the Court having duly considered the evidence, both oral and documentary, introduced and the cause being submitted, and the Court having rendered its written opinion on March 9, 1973, said opinion shall constitute the findings of fact and conclusions of law pursuant to Rule 52, Federal Rules of Civil Procedure.

DATED this ..... day of March, 1973.

UNITED STATES DISTRICT JUDGE

PRESENTED BY:

BOGLE, GATES, DOBRIN, WAKEFIELD & LONG

By JOHN P. SULLIVAN
JOHN P. SULLIVAN
Attorneys for Defendant

APPROVED AS TO FORM AND CONTENT
AND NOTICE OF PRESENTATION WAIVED:

JACKSON, ULVESTAD & GOODWIN

By
Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE

BURL RAINES, *Plaintiff,* v. AMERICAN MAIL LINE, LTD., *Defendant.*	CIVIL ACTION FILE NO. 16-71C2 JUDGMENT

This action came on for trial (hearing) before the Court, Honorable W. T. Beeks, United States District Judge, presiding, and the issues having been duly tried (heard) and a decision having been duly rendered,

It Ordered and Adjudged that the plaintiff take nothing and that this action be and hereby is dismissed.

FILED IN THE
UNITED STATES DISTRICT COURT
Western District of Washington
MARCH 13, 1973
EDGAR SCOFIELD, *Clerk*
By ....., *Deputy*

Dated at Seattle, Washington, this 13th day of March, 1973.

EDGAR SCOFIELD
Clerk of Court

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BURL RAINES,
Plaintiff-Appellant,
v.
AMERICAN MAIL LINE, LTD.,
Defendant-Appellee.

FILED
JANUARY 15, 1975
CLERK
U.S. COURT
OF APPEALS
No. 73-1887
MEMORANDUM

Appeal from the United States District Court
for the Western District of Washington

Before: CHOY and GOODWIN, Circuit Judges and BURNS, District Judge.*

Raines, a longshoreman, was injured while loading cargo into defendant-appellee's ship. He appeals from a judgment for defendant, the trial court having found that his injuries were not caused by any unseaworthiness of the ship.[1] We affirm.

Raines was hired to load the S.S. Washington Mail at Pier 46, Seattle, on the night of January 5, 1970. With a partner, he worked wrapping slings around bundles of steel which were then to be lifted from a railroad gondola car on the pier into the ships' hatch. One load of steel, which had been lifted and re-landed in the car, suddenly swung wild and crushed Raines's legs.

Faced with conflicting and not "completely truthful" testimony, the trial court declared itself unable to determine the exact cause of the accident. Negligence of the plaintiff or other workman, or both, may have been

*Hon. James M. Burns, United States District Court for the District of Oregon, sitting by designation.

1. Raines had at first proceeded on a neglicence theory as well, but dropped this claim from the pre-trial order. Although the claim is, as a result, not properly raised on appeal, we note that *Arvidson v. Dillingham Corp.*, 462 F.2d 1 (9th Cir. 1972), *cert. den.* 409 U.S. 983, bars recovery against a longshoreman's employer on such a theory when state workmen's compensation benefits are paid.

responsible, but an "isolated, personal, negligent act" cannot create the condition of unseaworthiness. *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 500, 91 S. Ct. 514, 518 (1971). Since none of the causes found to be possible could have made the ship unseaworthy, the trial courts' inability to choose among them is not consequential.

In addition, the court found specifically that "the injures were *not* caused by defective gear, inadequate lighting, movement of the vessel or failure to have a signalman stationed on the dock." These are the stuff of unseaworthiness. Although the record of course shows evidence on both sides, we are convinced upon review that the findings of fact are not clearly erroneous.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BURL RAINES,
Plaintiff-Appellant,
v.
AMERICAN MAIL LINE, LTD.,
Defendant-Appellee.

FILED
MARCH 3, 1975
CLERK
U.S. COURT
OF APPEALS

No. 73-1887
ORDER

Before: CHOY, and GOODWIN, Circuit Judges, and BURNS, District Judge.*

The panel as constituted in the above case has voted to deny the petition for rehearing.

*The Honorable James M. Burns, United States District Judge, District of Oregon, sitting by designation.

APPENDIX D

OFFICE OF THE CLERK
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANUARY 15, 1975

73-1887—BURL RAINES v. AMERICAN MAIL LINES, LTD.

Dear Sir:

An opinion in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered January 15, 1975. Affirming the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,
Clerk
U.S. Court of Appeals

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1447

BURL RAINES,
Petitioner,

v.

AMERICAN MAIL LINE, LTD.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1447

BURL RAINES,
Petitioner,

v.

AMERICAN MAIL LINE, LTD.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

This is a longshoreman's personal injury suit against a shipowner-employer, arising from an accident in 1970. The longshoreman claims his injury was caused by unseaworthiness. The only question petitioner can pose to this court is as follows:

If, before the 1972 amendment to the Longshoremen's and Harbor Workers' Compensation Act, a longshoreman on the pier was struck and injured by a load he had helped

sling, and if the trial court after listening to the witnesses concluded (a) the accident might have been caused by negligence of one of the longshoremen, perhaps the plaintiff, but the exact cause was unknowable because the actors were not testifying truthfully, and (b) plaintiff failed to prove the accident was caused by the shipowner's use of an unsafe loading method, did the trial court err in dismissing the longshoreman's complaint, because he "failed to prove unseaworthiness"?

The court of appeals said the trial court did not err, citing *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S.Ct. 414, 27 L.Ed.2d 562 (". . . no condition of unseaworthiness existed, . . .").

STATEMENT OF THE CASE

Petitioner's statement of facts is not sufficient.

It does not explain why the trial judge had to conclude that none of the principal actors—Raines, his fellow slingman, the hatch tender, or the winch driver—was telling the whole truth about this accident. (Opinion, R. 66, Petition, A-2)

Also, petitioner's statement is misleading. For example, petitioner says "it was impossible for . . . the winch driver to see into the gondola car . . ." Page 5. Petitioner repeats this several times, pages 25, 28. In fact, the winch driver was stationed one deck level above the pier, and he said he could see the longshoremen working in the gondola car.[1] (Deposition, 14, admitted as Ex. A-48 to be read by court, Tr. 489, 490, 544)

1. The gondola car is an uncovered freight car shaped like an empty shoe box, with sides about four feet high. The car in which this accident occurred is pictured in two photographs appended to this brief, pages 17, 18 infra.

For these reasons we venture to re-state the pertinent facts.

On the night of January 5, 1970, the SS Washington Mail was berthed in Seattle, taking on cargo. (Pretrial Order, R. 35) Four longshoremen were engaged in hoisting bundles of angle irons[2] from a gondola car alongside the ship and lowering them down No. 5 hatch, when the petitioner Burl Raines was injured. He and Virgil Lund, his partner, were working in the car as slingmen. Richard Cross was working on board the ship as the winch driver. Albert Wylie, his partner, the alternate winch driver, was also on board, serving as the hatch tender. (Tr. 117, 159, 198, 328) At some time about 10:15 P.M. a slingload was swung or shifted sideways in the gondola car, pinning Raines' legs against the side of the car and injuring him severely. (Raines, Tr. 200-202)

No one else knew what was happening at this hatch when Raines was injured. Peters, the stevedore foreman, Winstad, his helper, Cvitkovic, the supercargo, and English, the night mate, had all watched these longshoremen working at times before the accident, but none of them was there when the accident happened. (Tr. 380, 384,

2. Individual pieces of steel were formed as angle irons. Stacks of these, four angle irons across, were assembled in a strapped bundle about one foot high, one and a half feet wide, and twenty to twenty-four feet long. The photographs taken shortly after the accident, appended to this brief, pages 17, 18 infra, show the shape of these bundles and the way they were stacked in the gondola car. Tr. 38A, 48, 141; Cross deposition, 7, Exhibit A-48. Each bundle weighed 5,400 pounds, and a sling load of two bundles weighed 10,800 pounds. Stipulation, Tr. 79. This was a small load in relation to the size and lifting capacity of the SS. Washington Mail. R. 59.

385 (Peters), 390, 393, 408-410 (Winstad, Cvitkovic), R.59 (English)[3])

The trial court heard testimony from Mr. Raines and the other longshoremen who were working at No. 5 hatch, from other men who were working aboard the ship and on the pier when the accident occurred, and from experts. When the witnesses had finished testifying the trial court was still uncertain how this accident happened.

> "Frankly in my own mind I am not certain as to how this accident happened, and I want to hear the views of counsel, and I am not going to decide it today.
>
> . . .
>
> "It goes right back to this proposition, gentlemen, as I discussed with you at the pretrial conference: Did the totality of the circumstances in this case result from the employer (American Mail Line) furnishing or directing or using an unsafe method of loading this vessel.
>
> . . .
>
> "The problem before me is factual. I've got to decide who I believe, what happened, and at this moment I don't know." (Tr. 544-546)

It will help this court to understand the trial court's problem if we here summarize the conflicting stories told at one time or another by the witnesses to this accident.

A. Actions of Winch Driver, the Petitioner, and his Slingman Partner

Three men knew what was happening in the moments before this accident occurred—Cross, at the winch controls above No. 5 hatch, and Raines and Lund, the men in the gondola car who were slinging the two bundles of

3. Abstract of deposition of William D. English, night port officer, read by the trial judge and considered as evidence. See Tr. 400-402.

angle irons to be lifted to the ship. They were all of them experienced in this sort of work.[4]

Wylie, the hatch tender, did not know what was happening, because he could not see into the gondola car, and he said he was not giving signals to the winch driver. "There was no way I could give the signal." (Tr. 176, and see 159, 161, 177) What follows, then, is a comparison of the different versions of this accident given by the three principal actors, Cross, Raines, and Lund.

Was load being lifted when Raines injured?

In a statement Mr. Cross made on the night of the accident, he said:

> "I was raising the load . . . when I heard Raines holler, . . .
>
> "At the time of the accident I was acting slowly picking up the steel in the lowest speed notch . . ." (Deposition, 16-18, and see 20, admitted as Exhibit A-48 to be read by court, Tr. 489, 490, 544)

Was load hanging in air when Raines injured?

In testimony three years after the accident, Cross said:

> "If I remember right, they (Raines and Lund) had me pick up the load and hold it, and from what I can gather, they were either shifting the sling or completing the round turn on the steel (angle irons). That's my recollection of what was happening." (Deposition, 39, Exhibit A-48; and see Tr. 358)

4. Cross had worked as a winch driver and crane operator and done other work on the waterfront for sixteen years. Tr. 325, 326. Raines had worked as a crane operator in the Navy, and had been a longshoreman in Seattle for four years before the accident. He had worked as a winch driver and as a hatch tender, and had loaded and unloaded all types of cargo. Tr. 19, 24-26. Lund had been a longshoreman in Seattle for ten years, and had worked as a winch operator and as a hatch tender. Tr. 113, 114.

Was load resting in car when Raines injured?

At the trial, two and a half months after his deposition was taken, Cross testified:

> "Q. (Mr. Goodwin) . . . Did anybody ask you to lift that load or raise it and re-land it in the car that night?
>
> "A. (Mr. Cross) Yes, one of the slingmen had asked me to raise it up and then I set it back down.
>
> . . .
>
> "Q. All right. Now when it was re-landed in the car, when you had accomplished that, were your winches on or off?
>
> "A. Off. . . ." (Tr. 332, and see 336)
>
> . . .
>
> "A. . . . I raised the load up and then when they got the timber under they had me to set the load down, and that's what I did, and after I set the load down, I don't recall if I was looking in the hatch or looking out across the bay, but the next thing I knew I heard Mr. Raines holler, . . ." (Tr. 334)

Both Raines and Lund testified at the trial that the load had been re-landed, set back down in the car, before the accident. (Tr. 198, 199 (Raines), 125, 126 (Lund))

Was winch driver at the controls?

Raines testified that Cross did not see the accident, that he was talking in the hold, that he was not on the controls when it happened. (Tr. 205, 206)

Lund, on the other hand, accused Cross after the accident of having moved the winch gear. Cross denied that: "I didn't touch the handles. I didn't move anything. . . . The handles were shut off." (Tr. 542, 543)

Who was giving signals to winch driver?

The winch driver, Cross, testified:

> "I work as directed. . . . they give me signals and that's what I do. I don't do nothing on my own up on the winches." (Deposition 33, Exhibit A-48)

He said that the slingmen were giving him the signals at the time of the accident. (Ibid., 35) Previously, Cross had said that the signals were being relayed by the hatch tender, Wylie, who was giving him his signals. (Ibid., 15)

Wylie said he was not giving signals, that the slingmen were. (Tr. 176, 177) One of the slingmen, Raines, confirmed this. (Tr. 277, 278, 280) The other, Lund, denied it. (Tr. 146, 148)

What was the court to believe? That Cross was "raising the load," "slowly picking up the steel, in the lowest speed notch," as he said on the night of the accident? That the slingmen had him "pick up the load and hold it," as he said three years later? That they had him "set the load down," and that the controls were off, as he said at the trial? That Cross was at the winch controls, as he said, or that he was not at the controls and was talking down the hatch, as Raines said? That the slingmen were giving Cross his signals, as Raines said, or that they were not giving him any signals, as Lund said?

It is this context that the trial court said:

> "The court has carefully reviewed the testimony of the principal actors in this tragic accident—the plaintiff, his slingman partner, the hatch tender, and the winch driver. None of them have been completely truthful in their testimony as to the manner of work or the manner in which plaintiff was injured. This lack of candor has made it impossible for the court to determine with any reasonable degree of certainty the exact cause of the accident.
>
> . . .

"It is possible that plaintiff's injuries were caused by the negligence of the winch driver, or the plaintiff or his slingman partner, or a combination thereof." (Opinion, R. 66, Petition, A-2)

B. Other Possible Causes of Accident

Condition of Hoisting Gear

Cross, the winch driver, said there was no trouble with the winches or winch controls.

"The gear, including booms, were properly rigged and positioned for the job and work at the time of the accident." (Deposition, 17, and see 28, 29, Exhibit A-48, re-affirmed as true, Tr. 344-351)

The ship's electrician, Callahan, and the relief mate, English, verified that there was no complaint about the winches or winch controls at No. 5 hatch either before or after the accident. (Deposition, 6, 8, 18, read by the court, see Tr. 405, 406, 488; English, abstract of deposition, R. 58)

Lighting

The winch driver said:

"The area on the dock and ship and gondola car, was lighted very good, . . ." (Cross deposition, 17, Exhibit A-48)

The relief mate and stevedore foreman verified that the lighting was good. (English, abstract of deposition, R. 57; Peters, Tr. 385)

Unusual Rolling of Ship

Plaintiff's theory was that the winch driver relanded the two bundles of angle irons in the car with tension from the winch remaining, at a time when the ship was being loaded with similar bundles at hatches No. 2 and 3. Lifting of these bundles at the other hatches caused the

ship to roll, creating a danger that as the ship rolled outboard the taut runner would lift the load in the gondola car and that the load would swing towards the ship. Pretrial Order, R. 39. Several of plaintiff's witnesses said the Washington Mail was tender, "cranky," this night, and rolled unduly from side to side during the loading. (Anderson, Tr. 88, 89; Maloney, 44, 45, 49, Wylie, 162) Two of defendant's witnesses said the ship was stable. (Peters, Tr. 388; English, R. 57)

Captain Seymour, a graduate of the Massachussetts Institute of Technology, licensed as a ship's master and as a professional engineer and naval architect, determined that the metacentric height of the Washington Mail at the time of the accident was 5.3 feet, as compared with a normal operating height of about 4 feet. (Tr. 439-443)

". . . in layman's terms it would make the vessel very stiff, requiring considerable moments, heeling moments, to transfer weights to effect a change in list." (Tr. 443)

Supposing that three loads of angle irons were being lifted at the same time at the forward hatches—a combined lift of 12.8 long tons—and that they were carried the maximum distance inboard, the angle of heel would be a half of a degree and the winch's hook would move toward the ship nine inches. (Tr. 447, 448, 450, 467, 468, 470, 471) If such loads were not lifted in unison the angle of heel would be less. (Tr. 451)

All ships roll to some degree when cargo is being loaded. (Cross, Tr. 29; Anderson, 96, 97) Slack in the winch runner is what keeps a load from rising and shifting if it has been slung and re-landed on the pier. (Raynaud, Tr. 237)

Slack in the winch runner would have prevented this accident. (Anderson, Tr. 99-101)

> "(The Court): Isn't that an inference I certainly could draw from the evidence that I have heard so far, that this would not have initially happened if there had been slack in the winch runner?
>
> "(Mr. Goodwin): Yes, Your Honor, you could make that assumption certainly, . . . (Tr. 248)

The court could infer from all of this that the ship was not unstable, as plaintiff claimed. If the load moved at all (supposing it had been re-landed), it moved because the winch runner was taut, and the longshoremen should not have left it taut—they should have put slack enough in the runner to make sure there would be no inadvertent lifting.

Need for Extra Signalman

Plaintiff asserted that the shipowner should have posted another longshoreman in the gondola car to signal the winch driver. (Pretrial order, R. 39, and see Tr. 107) Some of plaintiff's witnesses said this operation was not safe and that another hatch tender should have been employed. (Tr. 86, 87, 94, 95 (Anderson), 29, 31, 32, 36, 59 (Maloney), 233, 234 (Raynaud), 159, 163-165 (Wylie)) The trial court did not accept this opinion, perhaps because they exaggerated the situation or misstated facts.[5]

5. Anderson was hatch tender at No. 2 or No. 3, where the same kind of cargo was being loaded from the same kind of gondola car. As the hatch tender he was the one responsible for the safety of his gang. He did not complain to the stevedore foreman or ask for an extra man at his hatch. He had never known of an extra man being called to overlook discharge of a gondola car from on shore. Tr. 84-88, 98, 99.

Maloney, also an experienced longshoreman, said the opposite: "Generally when there is a situation like this an extra hatch tender is provided." He claimed he had never seen a slingman give signals to a winch driver to operate his winch. He also said that the tide ebbed until almost midnight, that the top of the bulwark at No. 5 hatch was about even with the bull rail on the pier, and that because of this, in his opinion, Cross could not see into the gondola car when the accident occurred. Tr. 33, 34, 56, 57, 61. [It was stipulated that low tide occurred at 8:54 p.m., an hour and a half before the accident. Tr. 119. The main deck of the ship at No. 5 hatch was therefore about .3 feet above the level of the pier at the time of the accident, and the bulwark much higher than that. Tr. 437, 438.]

Raynaud did not claim he knew of any practice to call in a second hatch tender.

Wylie made the unbelievable statement that the ship's rail was two feet below the bull rail on the pier. Standing on the main deck, "I was gazing around looking underneath the (gondola) car when the accident happened." Wylie claimed that he had asked Mr. Winstad for an extra hatch tender to be stationed on the pier because of the extreme low tide. Tr. 163, 167. [Both the stevedore foreman, Peters, and his assistant, Winstad, denied that any request was made for an extra hatch tender. Tr. 382, 394-398.]

The winch driver at No. 5 hatch, Cross, did not say he needed a hatch tender on the pier. He was standing at the controls one deck above the main deck, and he could see the slingmen in the gondola car. The slingmen were giving the signals, what they wanted done. (Tr. 332-334, 342, and deposition, 14-16, 28, 33, 35, 39, Exhibit A-48)

Other witnesses said they saw no reason for extra hatch tenders. (Aschbrenner, Tr. 414, 415, 419, 421, 429; Peters, Tr. 380, 384, 385)

The court could infer from all of this that the winch driver did in fact have a good view of what the slingmen were doing, that the slingmen—both of them practiced winch drivers and hatch tenders—were quite capable of giving the signals to the winch driver.

The finding of the trial court was:

> "The injuries were *not* caused by defective gear, inadequate lighting, movement of the vessel or failure to have a signalman stationed on the dock.
>
> "In other words, plaintiff has failed to establish,

by a preponderance of that evidence which the court credits and believes, that the method of loading created an unreasonable risk of injury. Accordingly, he has failed to prove unseaworthiness." (Opinion, R. 66, 67, Petition, A-2)

ARGUMENT

Petitioner shows no reason for this court to grant certiorari. He does not even argue that this case is of interest to anyone except the parties.

1. There is No Conflict with Decisions from Other Circuits

There is no conflict between this Raines decision and the two decisions from other circuits cited by petitioner.

All three cases had to do with a workman helping to load a ship, injured in an accident while cargo was being hoisted, before the 1972 amendment to the Longshore Act. In all three cases the issue was the same: Was the accident caused by unseaworthiness by use of an improper method to load the cargo? *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 499, 91 S.Ct. 514, 27 L.Ed. 2d 562 (1971)

In one case the petitioner cites, the answer was yes, the accident was caused by an improper method of loading. The winch driver had to be able to watch movement of the sling to compensate for abrupt rolling of the ship caused by the use of "housefalls," and he could not see movement of the sling because it was night and there was not enough artificial light—the lighting was "very poor." *Tucker v. Calmar Steamship Corporation*, 457 F.2d 440 (4 Cir. 1972)

In the other case the petitioner cites, the answer was maybe, the accident could have been caused by an improper method of loading. The jury should have been permitted to consider not just defendant's theory that the method was proper because it was accepted industry practice, but also plaintiff's theory that the method was improper because the crane operator had no window in his cab and no signalman to guide him. *Burns v. Anchor-Wate Co.*, 469 F.2d 730 (5 Cir. 1972)

In this Raines case the answer was no, the accident was not caused by an improper method of loading.

". . . (P)laintiff has failed to establish, by a preponderance of that evidence which the court credits and believes, that the method of loading created an unreasonable risk of injury. Accordingly, he has failed to prove unseaworthiness." (Opinion, R. 67, Petition A-2)

The court of appeals reviewed this decision, and affirmed it.

"Although the record of course shows evidence on both sides, we are convinced upon review that the findings of fact are not clearly erroneous." (Memorandum, Petition A-7)

2. There is No Important Question of Federal Law in this Case to be Settled by the Supreme Court

Raines bases his claim against the shipowner on breach of an implied warranty of seaworthiness. (Pretrial Order, pars. 10, 11, R. 38, 39) What constitutes breach of the warranty in a case of this kind, as distinguished from negligence of a fellow longshoreman, has been fully debated in *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S.Ct. 514, 27 L.Ed.2d 562 (1971).

Since Raines was injured (January 1970) the implied warranty of seaworthiness extended to longshoremen has been revoked. Public Law 92-576, § 18(a), October 27, 1972, amending the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(b):

> ". . . The liability of the vessel (to a longshoreman) . . . shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred."

The law applying to this case as elucidated in *Usner* is past history, and petitioner points to no significant question this court ought now to consider.

3. The Questions Presented by Petitioner are Groundless

The questions presented in the Petition, page 2, are groundless.

No. 1 can be restated as follows: (a) it is a fact that the Washington Mail was unseaworthy; (b) therefore, must not the decision of the district court be in favor of the plaintiff longshoreman?

This is a groundless question because plaintiff failed to prove unseaworthiness. (Opinion, R. 67, adopted as the court's finding, R. 69)

Plaintiff's assertions that this and that are undisputed facts are sufficiently answered in our Statement of the Case. Whatever the cause of the accident may have been, plaintiff failed to prove that the cause was an unsafe method of loading being used by the shipowner; plaintiff therefore failed to prove unseaworthiness.

Question No. 2 asks whether the decision in this case from the Ninth Circuit is inconsistent with the *Tucker*

decision and the *Burns* decision from the Fourth and Fifth circuits. Petitioner asserts that Raines is in direct and irreconcilable conflict, but does not explain himself.

For the reasons stated in part 1 of this argument, respondent cannot agree that Raines is in conflict with the other decisions.

Question No. 3 asks whether the court of appeals has misinterpreted *Usner* in this case. Petitioner asserts or implies three facts supporting his statement that the court of appeals has "completely misinterpreted and misapplied" *Usner*.

First, petitioner asserts that the lifting of bundles of angle irons from the gondola car was being done blind —"circumstances where neither the winch operator nor the hatch tender could observe what was going on in the gondola car." (Petition, page 28) Petitioner asserted the same thing at trial. (Pretrial Order, pars. 5, 6, 10A, D, R. 36-39) Petitioner failed to persuade the trial court that this was the truth of the matter, and there was reason to doubt it. As shown in the preceding Statement of the Case, Cross was a deck level above the pier, he could see the men working in the gondola car, both Raines and Lund were capable of giving hand signals to Cross, and they probably were giving the signals.

Second, arguing from the first premise, petitioner asserts that this accident could not have been caused by an isolated, personal, negligent act by one of the longshoremen. But what if one slingman gave a premature signal to lift? Or if Cross failed to lay down enough slack in one of the winch runners? Petitioner has conceded that this

last isolated, personal, negligent act could have caused the accident. (Tr. 248, above quoted, page 10)

Third, petitioner asserts that the trial court did not base its decision on *Usner* (and, petitioner, implies, the court of appeals therefore was wrong to base its decision on *Usner*). Supposing this has something to do with the question, petitioner's assertion is mistaken. A principal issue in the trial of this case was the application of *Usner* to the facts. (Pretrial Order, R. 44)

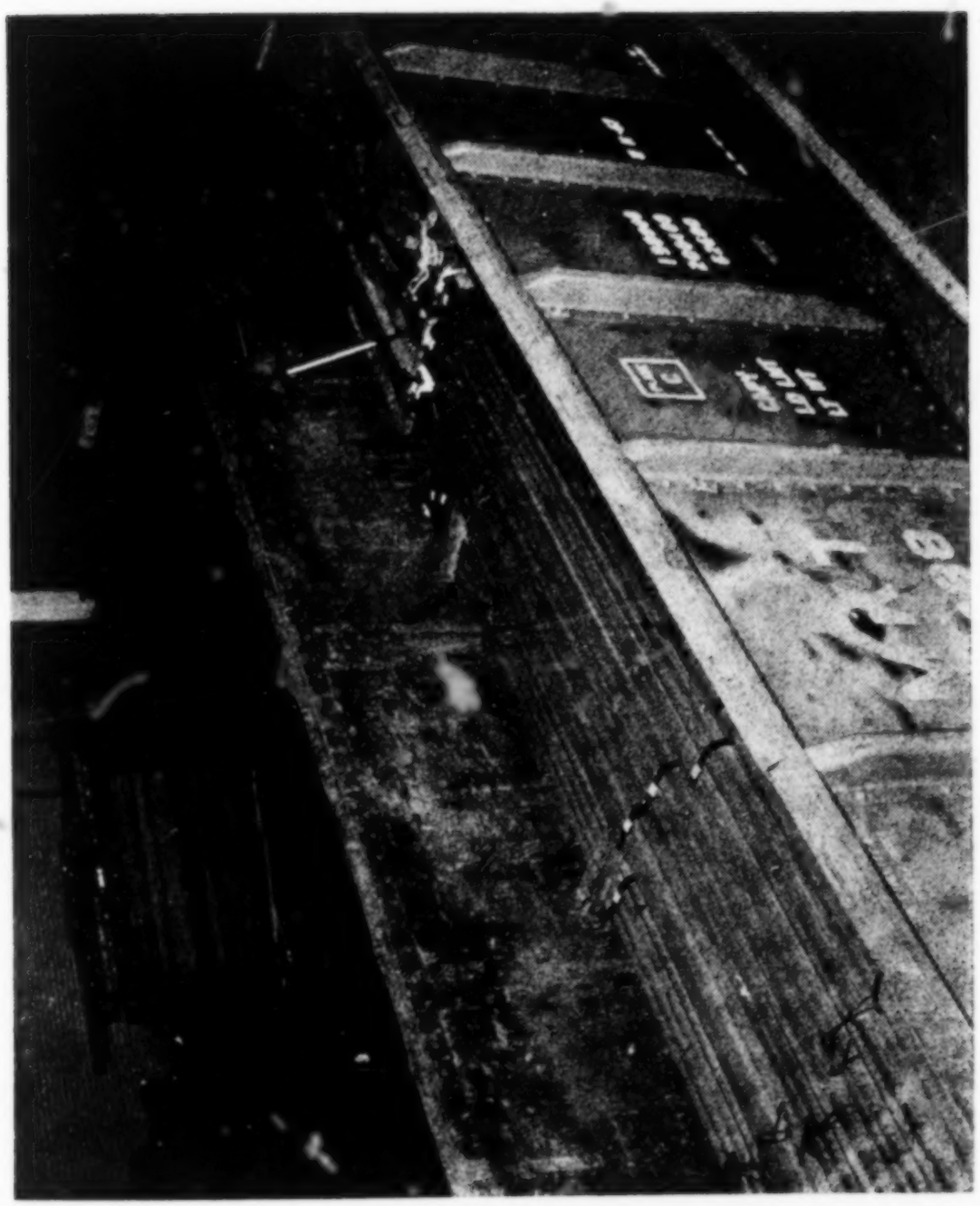
CONCLUSION

Petitioner shows no reason why this case should be reviewed. It was rightly decided, and the law which applies has been adequately stated by the Supreme Court. The petition should be denied.

Respectfully submitted,

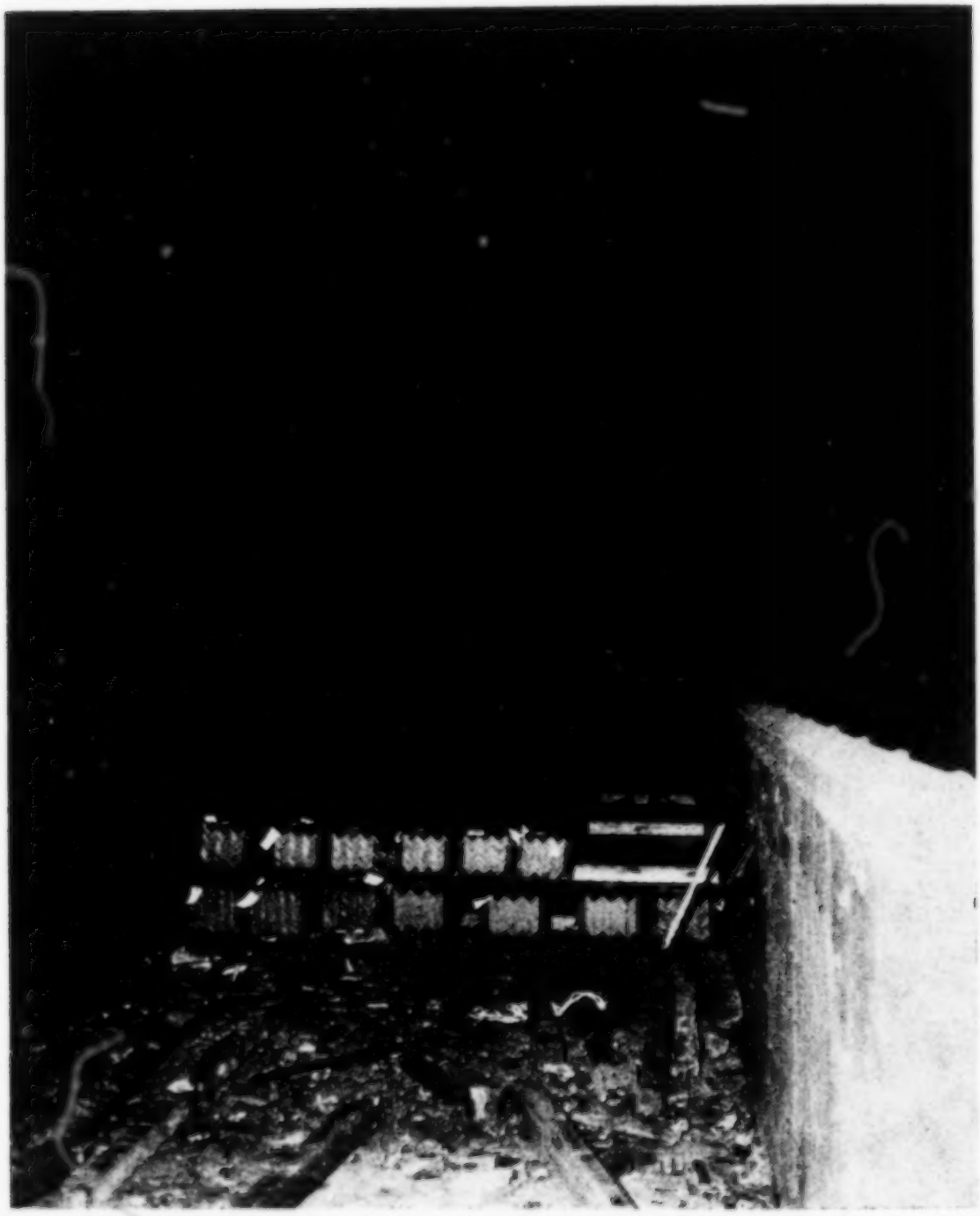
M. BAYARD CRUTCHER
Counsel for Respondent

Defendant's Exhibit A-14



Gondola car as viewed from ship. Raines was walking on top of the bundles of angle irons, on side closest to ship, and was headed towards far end of car, when he was struck.

Plaintiff's Exhibit 13-A



West end of gondola car, as viewed from inside the car. SS Washington Mail is at the left. Sling load which struck Raines consisted of two bundles of angle irons taken from void space at right side of upper tier.

JUN 17 1975

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1447

BURL RAINES,
Petitioner,

v.

AMERICAN MAIL LINE, LTD.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Comes now petitioner and herewith respectfully submits this reply brief directed toward certain issues raised by the Brief in Opposition to Petition for Writ of Certiorari filed herein by respondent.

STATEMENT OF THE CASE

Respondent's recitations, appearing on pages 2, 3 and 4 are inaccurate and absolutely misleading! Exhibit A-48, the deposition of Richard L. Cross, the winchdriver, does contain the following testimony:

"Q. Were you able to see into the gondola car?

"A. No more than the upper parts of their body, and when they hook the loads up then they would get back in the clear for me to pick the loads up."

(page 10, lines 14 through 17, Deposition of Richard L. Cross)

Again, on pages 14 of the deposition the following statement of Richard L. Cross appears:

"At the winch controls I am one deck above the main deck. At the time of the accident the top of the ships rail was about six inches above the dock bull rail. At the winch controls I could see the men in the car, *but I could not see the steel bundles or lifts because of the sides of the gondola car.*
(Emphasis supplied)

(Page 14, lines 16 thru 21)

On page 17 of his deposition Richard L. Cross further testified as follows:

". . . but I could not see in the gondola car at the level of the steel because of the side of the gondola car."

(page 17, lines 9 thru 11)

Witness Cross also testified on page 19 of his deposition

". . . but from where I was I was just a very little above those guys in the gondola, and I could see only I guess from chest up, you see."

Another part of the Cross deposition refers to a letter written to witness Cross by an investigator who had investigated the facts and circumstances surrounding the accident and, referring to the winch operator, states as follows:

"Cross states that he had no idea as to either what happened inside the gondola, nor why it happened."

(Page 21, lines 14 to 16, Cross deposition) and on page 22 it continues

"Cross could not see into the car, except for the upper chest and heads of the men in there when they were at the west end of the car. They were out of his sight when they walked back into the east end, and this is where they went when the lift was made"

(Page 22, lines 11 thru 16, Cross deposition)

During the trial of this matter Cross testified as follows concerning his ability to see into the gondola car:

"Q. Okay. Now, when you came back from the coffee break did you notice whether or not you could see the men working in this gondola car that you were taking the steel out of?

"A. Only the top parts of their body. I mean the ship was down so low I could just see from maybe their waist up. I couldn't see down below around the knees or lower.

"Q. Okay. When they were trying to hook onto a load that was stowed in that gondola car, considering the level of the vessel and the dock and the tide right after the coffee break, *could you see down into the bottom of the gondola car at that time to see what they were doing*?

"A. *I couldn't see into the gondola car at any time.* I could just see the men up in the gondola, so much of their body. (emphasis supplied). (Tr. 330, lines 5 thru 19).

"Q. Now, Mr. Cross, on this load that eventually injured Mr. Raines, did you see how these slingmen in that car hooked up to that load? Did you see how they hooked up to it or hooked onto it when it was still stowed in the car?

"A. *No, I could not see into the car.* (emphasis supplied). (Tr. 332, lines 7 thru 11).

"Q. (By Mr. Goodwin) Mr. Cross, I want to ask you about part of that last answer. When these men asked you to pick this load up and re-land it, could you see them down in there using that snorter or could you see them putting that timber under the load?

"A. The only time I could see the timber was when the men was standing up with it in the air, *but when they went down in the car I couldn't see the operation down in the gondola.*" (Tr. 334, lines 21 thru 25, and Tr. 335, lines 1 to 4)

In an attempt to clarify some of his earlier testimony or statements in his depositions, Mr. Cross testified as follows:

"A. *But I think I also said that I couldn't see what was actually going on in the car,* but here I think it says that I had picked up the load and was holding it for them.

"Now, that could have been what I did. I could have been holding the load for them or they could have been putting a timber underneath. *Like I say, I don't know what they were doing inside of the car, the gondola.*" (emphasis supplied) (Tr. 358, lines 1 thru 7)

It is obvious from a reading of the quoted portions of the testimony of Richard Cross that he was unable to observe whether or not the load of steel was moving within the gondola car at any time prior to the occurrence of the accident in question.

The winch operator was operating "blind," since he could not see what movements, if any, the steel bundles were making within the car and since the hatchtender, Wylie, was also incapable of seeing into the gondola car. Under the circumstances, whether the load was raised by Cross under the "blind" but mistaken assumption that it was safe to do so, or, whether the load was caused to raise and swing due to the action of the vessel, it was impossible for any corrective action to be taken by the winch operator to protect the men in the car since the winch operator could see nothing within the car and the hatch tender was in no position to provide any assistance.

With all due respect to counsel for respondent, he has engaged in an attempt to artificially create a reasonable basis for the decision of the trial court, and/or for that of the Court of Appeals, by setting forth certain portions of the testimony touching on whether the load was being lifted when Raines was injured, whether the load was hanging in the air, whether the winch driver was at the controls, who was giving signals to the winch driver, etc. As has previously been asserted by petitioner, those issues are absolutely irrelavent to the determination of the issues before this court! Regardless of how one might resolve those minute factual disputes, the fact remains that the load of steel swung and crushed Raines against the side of the gondola car, that the load could only have been caused to raise from the position where it had been re-landed and to swing to the point where it hit Raines for one of two reasons, i.e. the rolling action of the vessel or the operation of the winches, and that, regardless of which of these two reasons caused the load to lift and swing and injure Raines, the lifting and/or the swinging of the load could have been prevented if either the winch driver or the hatch tender had been able to see into the gondola car!

On page 8 of his brief, counsel for respondent discusses "Other Possible Causes of Accident," which discussion is completely immaterial since petitioner has never claimed that the condition of the hoisting gear or the lighting contributed to the cause of his accident.

Under the heading, "Unusual Rolling of Ship," counsel again tries to convince this court that the ship did not "move," and/or that it did not move enough to cause the load of steel to swing and injure petitioner. Petitioner has

consistently asserted from the time of trial of this matter to the present, that it makes no difference whatsoever whether the rolling of the ship, or the operation of the winch caused the load of steel to swing, since either cause could have been detected and corrected had defendant positioned a hatch tender at a point where he could observe what was going on within the gondola car and who could then relay that information and/or instructions to the winch operator.

Under the heading, "Need for Extra Signalman," counsel again is apparently attempting to provide some reasonable explanation for the trial courts dismissal of petitioner's cause of action. It should be remembered at this point that the memorandum opinion of the trial court indicated, in substance, that *some* witnesses testified untruthfully about *some* issue. For that reason the court could not figure out, "how this accident happened." As has been previously pointed out, such a conclusion by the trial court is totally unfounded in fact or law, since no amount of untruthful testimony (if such existed) could alter the fact that the load did move and swing to the point where it hit and injured petitioner and that the occurrence of the accident in that manner could easily have been prevented had the winch operator not been operating *blind*!

ARGUMENT

Counsel for petitioner will not re-state his contentions to the effect that the decision in the case at bar is in conflict with the decision of the United States Court of Appeals for the Fourth Circuit concerning the case of *Tucker v. Calmar Steamship Corporation*, 457 F.2d 440 (4 Cir. 1972), and the case of *Burns v. Anchor-Wate Co.*,

469 F.2d 730 (5 Cir. 1972), since a simple reading of the opinions in both of these cases will demonstrate the inaccuracy of respondent's contentions at this point in his brief.

Finally, with reference to the comments made by respondent under the subheading, "The Questions Presented by Petitioner are Groundless," counsel for petitioner cannot follow the comments made under that sub-heading and therefore will not attempt to reply thereto. However, since the case of *Usner v. Luckenbach Overseas Corp.*, 400 U.S. 494, 91 S. Ct. 414, 27 L. Ed. 2d 562 (1971) is mentioned under that subheading, and since respondent's comments with respect to the *Usner* case are somewhat confusing, petitioner wishes to state that, as he has maintained from the time of trial to the present, that the conduct of respondent's employees constituted a series of connected acts, all of which culminated in a condition of unseaworthiness, i.e. an unsafe method of loading which proximately resulted in petitioner's injuries. Counsel for petitioner was shocked, to say the least, to note the reference to and citation of the *Usner* case in the opinion of the United States Court of Appeals for the Ninth Circuit since the facts of the *Usner* case and the principles set out in that opinion are so clearly inapplicable to the case at bar.

Respectfully submitted,

DANIEL G. GOODWIN
Counsel for Petitioner